Decision 03-01-087 January 30, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Qwest Communications Corporation (Qwest), U-5335-C and its wholly owned subsidiary, LCI International Telecommunications Corporation, doing business as Qwest Communications Services (LCIT), U-5270-C to determine whether Qwest and LCIT have violated the laws, rules and regulations governing the manner in which California consumers are switched from one long distance carrier to another and billed for long distance telephone services.	I.00-11-052 (Filed November 21, 2000)

ORDER DENYING REHEARING OF DECISION NO. 02-10-059

I. INTRODUCTION

In this order, we deny the joint application for rehearing filed by Greenlining Institute and the Latino Issues Forum. We also deny the application for rehearing filed by respondent Qwest Communications Corporation ("Qwest").

II. PROCEDURAL HISTORY

The Commission instituted this formal complaint proceeding against Qwest and its subsidiary, LCI Telecommunications Corporation, on November 21, 2000. The complaint alleged that between January 1, 1999 and mid-2000, Qwest and its sales agents switched thousands of customers to Qwest's long-distance service without authorization, in violation of Section 2889.5, and placed thousands of

unauthorized charges on the bills of California customers, in violation of Section 2890. Greenlining Institute and the Latino Issues Forum (jointly "Greenlining/LIF") intervened on behalf of customers. Following evidentiary hearings, the Presiding Officer issued a Proposed Decision finding 3,581 slamming violations and 4,781 cramming violations and imposing a substantial fine for these violations (approximately $38 million) pursuant to Section 2107. Qwest and by Greenlining/LIF appealed the Proposed Decision, and in response to those appeals some modifications were made and discussion was added addressing issues raised on appeal. The Commission ultimately adopted an Alternate Decision proposed by Commissioner Wood that differed from the Modified Decision on Appeal only in that it balanced the criteria for determining the amount of the fine somewhat differently and imposed a smaller fine ($20,340,000). The Alternate Decision was adopted unanimously on October 24, 2002. Qwest and Greenlining/LIF filed timely applications for rehearing.

III. QWEST'S APPLICATION

Qwest challenges Decision 02-10-059 (" the Decision") on the grounds that: 1) the findings are not supported by substantial evidence; 2) the Commission should have applied a higher standard of proof; 3) the $20.3 million penalty is excessive under the Commission's standards; 4) the penalty is excessive under federal constitutional standards; 5) the Commission has no authority to impose a fine; and 6) assuming the Commission has such authority, it should have calculated the fine on a per-day basis instead of a per-violation basis. Assuming the Commission has the authority to impose a fine, Qwest contends that it should not exceed $4,015,000.

None of these contentions have merit. The first four claims are addressed in the Decision, and we will not repeat those discussions here. We will address each claim briefly.

1) Sufficiency of the Evidence

a) Slamming (Section 2889.5)

The Decision fines Qwest for 3,581 violations of Section 2889.5. One hundred fifty-nine of these violations are based on evidence of the experience of individual consumers who were interviewed by the Commission's Consumer Services Division (CSD, now CPSD). Two are based on the testimony of Greenlining/LIF's witnesses. The remaining 3,420 violations are based on evidence proffered by Qwest of "realized PIC disputes" between October 2000 and March 2001.[1] As explained in the Decision, Qwest classifies a PIC dispute as "realized" if Qwest cannot produce a third-party verification tape of the switch request within 14 days of a customer complaint of unauthorized switching, or if the customer denies that the voice on the verification tape is the voice of someone authorized to make changes to the service.

In its rehearing application, Qwest asserts that a "realized PIC dispute, without further investigation, is nothing more than uncorroborated hearsay which . . . is legally insufficient to constitute substantial evidence." (Qwest Rehearing App., p. 16. Qwest contends further that there is no corroboration of these realized PIC disputes, which are "not evidence." (Id., pp. 16-18.)

PIC disputes are indeed hearsay. Hearsay is admissible in Commission proceedings; at the same time, we acknowledge that, as a general matter, evidence may be admissible yet insufficient. Here, however, each of the 3,420 "realized" PIC disputes is in effect an admission by Qwest that it was unable to produce valid, timely proof that it had obtained customer authorization to switch service. Section 2889.5 requires telephone corporations both to obtain customer authorization and to provide verification of that authorization to the subscriber, the

[1] Qwest offered this evidence as an indication that its record on slamming was improving.

commission, or the Attorney General "upon request."[2] Thus, a PIC dispute that Qwest classifies as "realized' is an admission that Qwest failed to comply with Section 2889.5.

As explained in the Decision, Qwest classifies a PIC dispute as "realized" if a customer complains of an unauthorized switch and Qwest cannot produce a third-party verification tape (required by section 2889.5) within 14 days of the customer complaint, or the customer denies the voice on the tape is the voice of someone authorized to make changes to the service. (Decision, p. 20 and p. 58, Finding of Fact 4; see also Qwest Rehearing App., p. 15.) Qwest admitted to 3,420 realized PIC disputes between October 2000, when Qwest began tracking realized PIC disputes pursuant to its consent decree with the FCC, and March 2001.

The record also shows that 70,000 PIC disputes were reported by the Local Exchange Companies ("LECs") Pacific Bell and Verizon, and by Qwest itself in the period investigated. (Decision, p. 10.) Qwest argues that not all PIC disputes are slams and that the PIC data is unreliable. We reject this argument for the reasons stated in the Decision. We note that Qwest's chief challenge to the PIC data was that the LECs do not investigate PIC disputes involving alleged unauthorized transfers to Qwest. The record shows that this practice reflects Qwest's choice of a "no-fault" PIC dispute payment plan. In other words, Qwest elected not to have the LEC (Pacific Bell, in this instance) investigate the customer complaints, but instead to accept the complaining customer's assertion that his or her long-distance service had been changed to Qwest without authorization. Because the 'no-investigation' policy was Qwest's choice, its argument that this data is inherently unreliable is unpersuasive. Moreover, as the Decision notes, during the period covered by the investigation, Qwest itself relied on the LECs'

[2] The statute requires production "upon request" and is silent as to how much time the telephone service provider has to comply with this requirement. The Decision adopted 14 days from receipt of the request as a reasonable time.

PIC dispute reports to determine whether to terminate its sales agents. Thus, it appears that Qwest believed them to be reliable for this purpose. (Decision, pp. 14-15.)

Qwest's other arguments challenging reliance on the PIC data are similarly unpersuasive. Qwest argued, without any supporting evidence, that the high numbers of PIC disputes reported by Pacific Bell might be due to Pacific's "win-back" campaigns, but this argument was rejected because the PIC disputes at issue in this case involve switching of long-distance service only and Pacific had not entered the long-distance market in California at that time. (Decision, p. 12.) Qwest also argued that customer confusion might explain some PIC disputes, but produced no evidence of such confusion. Moreover, these arguments are essentially irrelevant because the Decision imposed a fine only on the basis of realized PIC disputes. As discussed above, these realized PIC disputes are essentially admissions of acts that constitute noncompliance with Section 2889.5.

Qwest argues that the Commission should have required evidence corroborating each and every realized PIC dispute, and that by failing to do so it improperly reversed the burden of proof, and violated Qwest's due process rights. (Qwest rehearing App., p.16-18.) This argument also lacks merit. The burden of proof was properly placed on the complainant, CSD, which produced the PIC dispute evidence. By Qwest's own admission, it was unable to produce the timely proof of third-party verification required by section 2889.5 in each of the realized PIC disputes that constitutes the basis for a finding of a violation. The Decision did not reverse the burden of proof by treating the realized PIC disputes as prima facie evidence of a slam, or by concluding that Qwest's admitted inability to produce a verification tape constitutes a violation of the statute.

Moreover, the record contains other specific and credible evidence of falsified verification tapes and forged letters of authorization (Decision, pp. 21-24). Qwest admitted that 58 of the complaints investigated by CSD in this case

involved forgeries. (Id. at p. 23.) This evidence supports the reasonable inference that the realized PIC disputes where a tape was produced but customers denied that the voice on the tape was that of a person authorized to make a switch were also slams.[3]

In addition to the PIC data, in 1999 and 2000, the Commission's Consumer Affairs Branch received 646 slamming and cramming complaints about Qwest. CSD submitted declarations from 61 customers; the Decision finds that Qwest slammed 60 of them. CSD investigators interviewed another 115 customers, the decision finds that 99 of them were slammed. Qwest argues that this evidence proves "at most 128 slams," rather than 159. (Decision, pp. 24-27.)

Qwest contends that the Decision ignores "undisputed evidence" that shows that resellers were responsible for 10 of the slams for which it was fined (Qwest Rehearing App., p. 26.) The record does not support this contention. The evidence to which Qwest points consists of an investigator's summaries and notes of interviews of customers who had complained to Verizon of unauthorized charges by Qwest on their telephone bills, and the same investigator's oral testimony at the hearing about those interviews. At most, this evidence reveals a possibility that resellers may have been involved. Qwest did not cross-examine any of the 10 customers it claims were slammed by resellers, nor did it produce any affirmative evidence that resellers were responsible. Qwest also points to an Exhibit it submitted (Exhibit 300, Tab E, Testimony of Pitchford), but that Exhibit contains nothing more than conclusory assertions that the ten slams in question involved "rebillers," without any explanation or evidence to support those conclusions. The Decision does not disregard this evidence, but simply does not find it persuasive. In its rehearing application, Qwest admits that during the discovery phase of the case, it refused to produce any evidence that resellers were

[3] As the Decision notes, the FCC similarly concluded that Qwest was relying on false verification tapes and forged letters of authorization.

responsible (Qwest Rehearing App., p. 27, fn. 45), and it fails to explain how any of the evidence it cites proves that resellers were in fact responsible for the slams rather than Qwest.[4] Thus, Qwest's claim that the Decision ignores undisputed evidence that resellers rather than Qwest were responsible for slams is simply unfounded.

Qwest further contends there is insufficient evidence to support findings of 21 other violations. (Qwest Rehearing App., p. 27 and Appendix A.) In each instance, Qwest reargues the evidence and disagrees with the inferences drawn by the Administrative Law Judge and the Commission, but these inferences appear reasonable. In short, there is substantial evidence to support the finding of slamming violations.

b) Cramming (section 2890):

Qwest challenges the Decision's finding of 4,871 cramming violations. Most of these violations are based on the 6,553 cramming complaints received by Pacific Bell against Qwest in 1999 and 2000, reported in its Business Office Referrals (BOR) Report. Qwest argues that the BOR, like evidence of PIC disputes, is hearsay that falls short of substantial evidence. The Decision found, however, that the BOR is the most accurate and up-to-date record the Commission has of such customer complaints. This conclusion is based in part on the testimony of Pacific's former General Manager of Consumer Protection, Sandy McGreevy, who testified that she believed the reports to be reliable. We reject Qwest's contention, already raised on appeal, that the BOR double-counts complaints that are really PIC disputes. As stated in the Decision, a customer whose service is switched without authorization will very likely be billed for unauthorized charges as well. Cramming and slamming are distinct offenses.

[4] In addition, Qwest asserts that it is not responsible for slams by resellers of its service, but this issue was not resolved in this case, most likely because Qwest produced no affirmative evidence that resellers were responsible.

In addition to the BOR evidence, a CSD investigator interviewed 54 customers who had complained to Pacific about unauthorized charges by Qwest in 1999. The Decision found sufficient evidence of cramming in 50 of those cases. Qwest contends that the evidence is sufficient in only 8 of them. (Rehearing App., p. 31 and Appendix B.) Here too, Qwest merely argues with the inferences drawn from the evidence in each case, but has not shown that these inferences were unfounded.

2) Burden of Proof

Qwest argues that the Commission should have required "clear and convincing evidence" of violations, rather than proof by a preponderance of the evidence[5] Qwest cites no authority for this argument, but contends that the fine imposed on Qwest is like a punitive damages award in a civil case, which must be supported by clear and convincing evidence.

The case law cited by Qwest in support of this argument is inapplicable, because statutory civil penalties like those authorized by Public Utilities Code Section 2107 are not punitive damages. Though both types of sanctions are "intended to punish the wrongdoer and to deter future misconduct," civil penalties and punitive damages differ in important ways and therefore require different evidentiary showings. See *People v. First Federal Credit Corp*. (2002) 104 Cal. App. 4th 721 (statutory penalties under the Unfair Competition Law require proof of violations by a preponderance of the evidence, while punitive damages require "clear and convincing evidence of oppression, fraud, or malice"). Among other distinctions, the amount of statutory penalties is determined by the Legislature (within a range, and capped), whereas the amount of punitive damages is determined by a fact finder (judge or jury). See *Rich v. Schwab*, 63 Cal. App. 4th

[5] The Commission requires that violations of the Public Utilities Code or other Commission requirements be proved by preponderance of the evidence. See *Communications Telesystems International (CTS),* D. 97-10-063, Finding of Fact 11. This is the standard usually required for civil penalties generally. See, e.g., *People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 431, fn. 9 (civil penalties under Unfair Competition Law).

803, 816 (1998) (while exemplary (punitive) damages and statutory penalties both are intended to punish wrongdoers, they are "distinct legal concepts, one of which is entrusted to the factfinder, the other to the Legislature"); see also *Beeman v. Burling* (1990) 216 Cal. App. 3d 1586, 1598-99 (where Legislature has set a minimum and maximum penalty for a violation, that sanction is a statutory penalty, not punitive damages).

Fines imposed by the Commission pursuant to Section 2107 are statutory civil penalties, with a minimum and maximum amount set by the Legislature ($500 to $20,000 per violation). The Commission correctly required that the violations alleged in this investigation be proved by a preponderance of the evidence. (D.02-10-059, p. 4 (citing CTS, D. 97-05-089, 72 CPUC2d 621, 642) and Conclusion of Law 1). As the Decision correctly noted also, proof of intent is not required to establish a violation of Section 2889.5. (Decision at p. 3.) Qwest's argument that the fine imposed by the Commission is akin to punitive damages and therefore requires a higher standard of proof, including proof that the violations were intentional, is without merit.

3) Excessive Fine (Commission standards)

Qwest argues that the $ 20,340,500 fine ($5000 for each of the 3,581 slamming violations and $500 for each of the 4,871 cramming violations) is excessive under Commission standards and in comparison to other slamming and cramming cases involving fines. (Rehearing App., pp. 33-67.) There is no merit to this argument. Commission standards are determined by state statute. The Commission has considerable discretion, once it has established a violation, to weigh competing factors and select a point within that range. All of the appropriate criteria were considered and are discussed in the Decision, and the fine in this case is at the low end of the statutory range. The main reason the fine is so large is because the number of violations established is large.

Surprisingly, Qwest argues that the fact that Qwest has been fined by other jurisdictions should be considered a mitigating rather than an aggravating factor. (Rehearing App., pp. 62-63.) The cases cited by Qwest in support of this argument merely stand for the proposition that courts may, under appropriate circumstances, take into account other civil awards against a defendant for the same conduct, and reduce an award accordingly. Neither the courts nor the Commission are legally required to do so in every case.

As the Decision correctly notes, the primary purpose of fines is to deter misconduct, and the fines imposed in previous California cases – even the $19 million fine imposed on CTS in 1997 -- were insufficient to deter Qwest in 1999 and 2000. In fact, it appears that the fines imposed on Qwest by other jurisdictions were insufficient to deter it from slamming and cramming California consumers. For example, the FCC issued a Notice of Apparent Liability to Qwest International for alleged slamming on October 15, 1999, and Qwest settled this case by making a $1.5 million payment in July of 2000 (Decision, p. 8), yet the evidence in this case shows that California customers were slammed and crammed by Qwest in the following months. In light of this record, and the large size of the California market, the Commission did not abuse its discretion in determining that a larger fine than those previously imposed on Qwest was necessary to deter Qwest from further cramming and slamming in California.

4) Excessive Fine (Constitutional standards)

Qwest argues that the fine violates the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution because it is disproportionate to the offense, and Qwest did not receive fair notice of the severity of the penalty. (Rehearing App., pp. 67-69 (citing *BMW of North America v. Gore* (1996) 517 U.S. 559.) These claims are meritless. *BMW v. Gore* addressed constitutional limitations on punitive damages, addressing civil penalties only for purposes of comparing the difference between a punitive damage award and civil penalties based on the same

conduct. The guidelines it sets forth do not apply to civil penalties. *People ex rel Lockyer v. Fremont Life Ins. Co.* (2002), 104 Cal. App. 4th 508. Section 2107 of the Public Utilities Code gave Qwest clear notice that it could be fined up to $20,000 for each violation of the Code, and Sections 2889.5 and 2890 clearly prohibit slamming and cramming. Thus, the Code provided clear notice of the potential severity of the penalty. See *Niebel v. Trans World Assurance Co.* (9th Cir. 1997), 108 F.3d 1123, 1131(California Civil Code provides clear notice that fraud can warrant an award of punitive damages). Even if the proportionality guidelines set forth in *BMW* applied here (which they do not), it cannot reasonably be argued that the fine was so disproportionate to the misconduct as to violate the Excessive Fines Clause of the Eighth Amendment. The record in this case established that Qwest committed slamming or cramming violations directly affecting well over 8,000 California customers. Moreover, these violations occurred after Qwest had been put on notice by other jurisdictions (including the FCC) that it was subject to sanctions for slamming, which is prohibited nationwide. As the Decision notes, this misconduct harms the public's interest in a well-functioning telecommunications marketplace as well as individual consumers. Given this record, the fine is not disproportionate.

Qwest also contends that the fine is higher than necessary to deter future misconduct, and therefore violates California law (citing *Adams v. Murakami*, 54 Cal. 3d at 311) (Rehearing App. at p. 68.) *Adams v. Murakami* dealt with punitive damages and is inapplicable to the civil penalty Qwest challenges here. *Rich v. Schwab*, supra, 63 Cal. App. 4th 803, 816; see also *People .v First Federal Credit Corp.* (2002) 104 Cal. App. 4th 721. In any event, as discussed above, given Qwest's record of slamming and cramming, the size of the California market, and the company's considerable resources (as the Decision notes, Qwest's revenues from California's residential long-distance customers in 2000 was $92 million; its CEO's total compensation for that year was $95 million), and the failure of lesser

sanctions to deter Qwest, the fine amount reflects the Commission's determination of an amount sufficient to deter further misconduct of this type by Qwest in California.

5) Commission's authority to impose a fine under Section 2107

Qwest makes a very brief argument that the Commission lacks authority to impose any fine at all. (Rehearing App., p. 72). Qwest relies on Section 2104, which provides in relevant part that "actions to recover penalties" shall be brought by the Commission in superior court. Other utilities have presented this argument to state appellate courts in recent years; those courts have all denied review. (See *Pacific Bell v. CPUC*, petition denied Nov. 27, 2002, No. A098039; *FutureNet, Inc. v. CPUC*, petition denied June 7, 2000; *Conlin-Strawberry Water Co., Inc. v. CPUC*, petition denied July 26, 2001, F 035333; *Southern Calif. Edison Co. v. CPUC*, petition denied Feb. 28, 2002, B156189.) As set forth in the Commission's briefs in those cases, the Commission construes Section 2104 to apply to the recovery of penalties, rather than the imposition of penalties. Qwest's argument that the Commission lacks authority to impose fines is without merit.

6) Calculation of fine on a per-day basis

Qwest suggests that the Commission should calculate the fine on a per-day basis, instead of a per-violation basis, pursuant to section 2108. This would result in a greatly reduced fine, in the $2 to $4 million range, which in Qwest's view would "bring the penalty more in line with Commission precedent." (Rehearing App., pp. 73-74.)

This argument does not constitute a claim of legal or factual error. Section 2108 provides that for penalty purposes, each day of a continuing violation constitutes a separate offense. The Commission has calculated fines on the basis of Section 2108 in cases where the evidence established that cramming, slamming, or other practices that violated statutory or decisional standards had occurred over a period of time, rather than specific instances of violations. Here, however, the

record contains evidence of specific violations, and the Commission has not erred in calculating the fine on that basis.

IV. GREENLINING AND LATINO ISSUES FORUM'S APPLICATION

Greenlining and LIF contend that the Commission erred by failing to impose the maximum statutory penalty of $20,000 for each slamming violation, because the slamming by Qwest was intentional. At a minimum, they argue, the maximum fine amount should be imposed for each proven instance of a falsified verification tape or forged letter of authorization.

The Commission has broad discretion to determine a fine amount within the statutory range. Although the Commission regards slamming and cramming as serious offenses, we have weighed several factors in determining the fine amount, and some of them weigh in favor of a fine at the lower end of the range. These factors are discussed in the Decision. The Commission has not abused its discretion by selecting a penalty amount at the low end of the range.

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Therefore **IT IS ORDERED that**:

1. The following typographical errors in Rehearing of D.02-10-059 are hereby corrected:

On page 54, line one, “$38 million” should read “$20 million.”

On page 60, Conclusion of Law 4, the word “statue” should read “statute.”

2. Rehearing of D.02-10-059 , as corrected above, is denied.

This order is effective today.

Dated January 30, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners